At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of October, 2019.

P R E S E N T:

HON. WAYNE P. SAITTA,

Justice.

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SHEYA SPILMAN,

Plaintiff,

- against - Index No. 515144/17

YOEL DOVID MATYAS,

Defendant.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	62-81 83-84, 86-96
Opposing Affidavits (Affirmations)	109-116
Reply Affidavits (Affirmations)	
Memoranda of Law	82 85 108 120

Upon the foregoing papers, in this action by plaintiff Sheya Spilman (plaintiff) against defendant Yoel Dovid Matyas (defendant) to recover monies owed to him, plaintiff moves, under motion sequence number four, for an order: (1) pursuant to CPLR 3212, granting him summary judgment against defendant on the ground that no genuine material issue of fact exists; and (2) requiring defendant to pay all of his fees and costs associated with this action.[1]

[1]Plaintiff's motion also sought an order, pursuant to CPLR 3215, granting him a default judgment against defendant. This branch of plaintiff's motion was resolved by an order dated

(continued...)

Defendant moves, under motion sequence number five, for an order, pursuant to CPLR 3212, granting him summary judgment dismissing plaintiff's complaint against him.

Facts and Procedural Background

On October 22, 2014, plaintiff and defendant entered into an agreement, entitled "Limited Partnership Agreement" (the First Agreement). The First Agreement set forth that defendant was the sole owner of a packaging business known as Exclusive Packaging, and that defendant was "ask[ing plaintiff] to invest a certain sum of money into the business, in order to buy a container from China for the business." The First Agreement provided that plaintiff was to be "a full partner in this particular business, and that which arises from it in the future." The First Agreement set forth that plaintiff was to invest $68,000 in the business to enable the purchase and delivery of one container from China, and that defendant was required to "manage a special account so as not to mix up the funds of [plaintiff] into [defendant's] overall business." The First Agreement stated that "[t]he two parties are full partners in [the] ownership of the goods of the container, and in all its benefits and responsibilities, either when it comes to [a] profit or to a loss . . . as well as to all types of decision making about it."

The First Agreement set forth that in exchange for plaintiff's $68,000 investment, "all of the gross profit of the container's goods, up to twenty two percent gross, is to be shared

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[1](...continued)
July 18, 2019, in which the court granted a cross motion by defendant, under motion sequence number six, compelling plaintiff to accept defendant's late-filed answer to plaintiff's amended complaint.

half and half by them," and profits above this amount would belong to defendant alone. In other words, each party was to receive up to 11% of the profits above the principal amount. The First Agreement stated that the goods in the container (which were packaging materials) would be sold and the proceeds collected "[w]ithin approximately 4 months." The First Agreement also stated that any future agreements would "be done according to the regime provided in this agreement."

Thereafter, defendant, again, sought additional funds from plaintiff to help him purchase another new container for his business. On January 26, 2015, plaintiff and defendant entered into another agreement, whereby plaintiff provided defendant with $23,000 to be repaid within two months with up to six percent of the profits (the Second Agreement).

On February 24, 2015, plaintiff and defendant entered into a third agreement, whereby plaintiff gave defendant $12,000 more to be repaid with two months with up to six percent of the profits (the Third Agreement). Thus, the total amount of money given by plaintiff to defendant for his business was $103,000. Defendant does not dispute that he and plaintiff entered into these three agreements and that plaintiff gave him these funds.

Plaintiff asserts that in the Spring of 2015, defendant confirmed the amounts owed pursuant to each of the agreements, but told him that he would have to wait to be paid because he was preoccupied with a personal matter involving one of his family members. Plaintiff further asserts that in the summer of 2015, defendant told him that he would have

an answer with respect to paying him by July 13, 2015, which he then changed to July 14, 2015, and finally stated that he needed until December 5, 2015. Plaintiff states that when defendant met with him, defendant then stated that he would need to wait until the results of a January 8, 2016 meeting.

Plaintiff claims that despite the fact that he regularly talked and texted with defendant, he was unaware that on December 8, 2015, defendant had filed a chapter 7 voluntary no asset bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York. According to plaintiff, in January 2016, defendant informed him that he would have to wait until after March 8, 2016, but promised that "as soon as it's resolved, you [will] get it [i.e., the monies investment plus profits] back." Defendant did not notify plaintiff of his bankruptcy proceeding and did not list plaintiff as a creditor in his bankruptcy petition. Plaintiff states that, unbeknownst to him at the time, March 8, 2016 was the date of defendant's creditors' meeting pursuant to 11 USC § 341, as well as the deadline for defendant's creditors to object to a bankruptcy discharge. On March 10, 2016, defendant received a discharge in bankruptcy pursuant to 11 USC § 727. Plaintiff asserts that defendant, thereafter, again stated that he needed more time.

On May 2, 2016, defendant asked plaintiff to provide his calculations of the sum total owed on all three agreements, and defendant confirmed that plaintiff's calculation of the amount of $118,480 was correct. In the summer of 2016, after much delay, defendant sent plaintiff checks, issued by his wife, Rozza Matyas, for a total amount of $118,480, which

were dated for October 1, 2016. Defendant claims that the reason that his wife issued these checks, instead of him, was because he did not have sufficient funds in his own account to pay plaintiff. However, on or about October 1, 2016, when plaintiff tried to cash one or more of the checks, they bounced, and plaintiff did not attempt to cash the remaining checks since there were insufficient funds in the account to cash them.

In February 2017, defendant advised plaintiff that he was purchasing a home in Toms River, New Jersey, and selling his house in Brooklyn, and promised to pay plaintiff at the closing. However, instead of paying plaintiff in full, defendant only provided $44,000 in partial payments, with one check issued on ,June 22, 2017 for $35,000 and another check issued on ,June 25, 2017 for $9,000.

On August 4, 2017, plaintiff filed the instant action against defendant. Plaintiff's complaint, as amended, sets forth 12 causes of action, consisting of a first cause of action for breach of contract, a second cause of action for an account stated, a third cause of action for unjust enrichment, a fourth cause of action for fraudulent inducement, a fifth cause of action for fraud, a sixth cause of action for breach of the duty of good faith and fair dealing, a seventh cause of action for breach of fiduciary duty, an eighth cause of action for conversion, a ninth cause of action for a violation of Debtor and Creditor Law § 273, a tenth cause of action for a violation of Debtor and Creditor Law § 274, an eleventh cause of action for a violation of Debtor and Creditor Law § 275, and a twelfth cause of action for a violation of Debtor and Creditor Law § 276. Defendant has interposed an answer, and discovery has

been completed, including the taking of the depositions of plaintiff and defendant. On February 20, 2019, plaintiff filed his note of issue. On April 19, 2019, plaintiff and defendant filed their instant motions.

Discussion

Plaintiff, in support of his motion, asserts that defendant has admitted that he entered into the three agreements with him and that he owed him his investments plus the returns on his investments. Both plaintiff and defendant agree that the monies that defendant owed plaintiff under the Second Agreement and the Third Agreement were satisfied by defendant's $44,000 payment, and that only the monies owed under the First Agreement are in dispute. Specifically, plaintiff asserts, in his supporting affirmation, that he seeks only the sums owed under the First Agreement. Likewise, defendant testified, at his deposition, that the $44,000 was for the Second Agreement and the Third Agreement (defendant's deposition tr at 67).[2] Defendant, however, owed a total of only $37,100 under the Second Agreement and the Third Agreement, and has paid plaintiff $44,000, which is $6,900 in excess of the amount owed under those agreements.

Defendant argues that he should be absolved from paying any amount owed to plaintiff under the First Agreement due to his discharge in bankruptcy. It is undisputed that

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[2]The principal amount of $23,000 plus six percent interest of $1,380 under the Second Agreement equals $24,380. The principal amount of $12,000 plus six percent interest of $720 under the Third Agreement equals $12,720. Added together, this equals $37,100. Defendant testified, at his deposition, that $23,000 and $12,000, plus the interest is $44,000, and stated "do the math." However, defendant has paid an excess of $6,900 over the amount owed under the Second Agreement and the Third Agreement.

defendant's debt to plaintiff was unscheduled and not disclosed on his bankruptcy petition. Defendant also does not deny that he continued to make promises that he would pay plaintiff, while surreptitiously filing for bankruptcy and obtaining his discharge in bankruptcy. Defendant nevertheless claims that his discharge in bankruptcy prevents plaintiff from pursuing his claim because it was a no asset bankruptcy case.

11 USC § 727 (b) governs discharges in chapter 7 bankruptcy liquidations. 11 USC § 727 (b) provides that "[e]xcept as provided in section 523 of this title, a discharge under . . . this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . ." 11 USC § 523, entitled "Exceptions to discharge," provides, in pertinent part, as follows:

> "(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . .
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> "(3) neither listed nor scheduled under section 521 (1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—
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> "(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing . . ."

Thus, generally, a discharge under 11 USC § 727 does not discharge an individual debtor from any debt where the debtor has omitted it from the schedule submitted to the bankruptcy court and thereby prevented his or her creditor from filing a timely claim (11

USC § 523 [a] [3] [A]). However, Federal Rules of Bankruptcy Procedure rule 2002 (e) provides as follows:

> "In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims."

Thus, Federal Rules of Bankruptcy Procedure rule 2002 (e) permanently tolls the statutory claims bar period for creditors to file their claims which extends until the time, if any, there is discovery that the debtor has some distributable assets. In *Upper Manhattan Empowerment Zone Dev. Corp. v Van Brackle Enters., Inc.* (8 Misc 3d 601, 609 [Sup Ct, NY County 2005]), the Supreme Court, New York County, ruled that in a no asset chapter 7 bankruptcy petition, the "failure to list [a debt] on [the] bankruptcy schedule does not affect the discharge of [the] debt pursuant to 11 USC § 727, because Federal Rules of Bankruptcy Procedure rule 2002 (e) obviates the application of 11 USC § 523." The reasoning enunciated by the Supreme Court, New York County, for this ruling was that "'[a]n omitted creditor who would not have received anything even if he [or she] had been originally scheduled, has not been harmed by omission from the bankrupt's schedules and the lack of notice to file a proof of claim'" (*id.* at 606, quoting *Judd v Wolfe*, 78 F3d 110, 115 [3d Cir 1996]). Thus, "all debts other than intentional tort debts [i.e., the debts "specified in paragraph (2), (4), and (6)" of 11 USC § 523 (a)] are presumptively dischargeable and need not be scheduled in order for the debtor to receive the benefit of a bankruptcy discharge"

Upper Manhattan Empowerment Zone Dev. Corp., 8 Misc 3d at 608). Federal district courts and bankruptcy courts within the Second Circuit have adopted this same interpretation of the Bankruptcy Code and Rules (*see In re Deutsch-Sokol*, 290 BR 27, 31 [SD NY 2003]; *In re Cruz*, 254 BR 801, 806 [SD NY 2000]; *In re Herzig*, 238 BR 5, 8 [ED NY 1998]; *In re Thompson*, 177 BR 443, 448 [ED NY 1995]). Defendant contends that, therefore, the fact that he did not list his debt to plaintiff on his schedule in his no asset bankruptcy case does not affect his discharge, and that plaintiff's present claim against him was discharged in bankruptcy. Defendant argues that this mandates dismissal of plaintiff's amended complaint against him in this action.

Plaintiff, however, contends that defendant's debt to him was not discharged in bankruptcy because it constitutes a debt specified in 11 USC § 523 (a) (2) and (4). 11 USC § 523, entitled "Exceptions to Discharge," provides as follows:

> "(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt–
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> . . .
>
> "(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
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> "(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> . . .
>
> "(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . ."

A debt which falls within the above categories are not discharged in bankruptcy (11 USC § 523 [a] [2], [4]). New York State courts have "the power, subject to statutory

exception, to determine the effect of a [bankruptcy] discharge" (*State of New York v Wilkes*, 41 NY2d 655, 657 [1977]; *see also Kavanagh v 107-18 Realty Assn.*, 114 AD3d 909, 909 [2d Dept 2014]). "New York state courts have concurrent jurisdiction with federal courts to interpret the Bankruptcy Code," and "have the authority to determine the effect of a debtor's discharge in bankruptcy on third parties . . . ." (*Upper Manhattan Empowerment Zone Dev. Corp.*, 8 Misc 3d at 608; *see also In re Palumbo*, 556 BR 546, 551-552 [WD NY 2016]).

There is an exception to the concurrent jurisdiction of state courts in that bankruptcy courts generally have exclusive jurisdiction to determine whether a debt is dischargeable under 11 USC § 523 (a) (2), (4) or (6) (11 USC § 523 [c] [1]; *see also* Advisory Comm Notes, reprinted following Federal Rules Bankr Pro rule 4007; *In re Palumbo*, 556 BR at 551). However, "[t]here is an exception to th[is] exception in cases where the creditor was not listed in the schedules in time to commence an action for exception to discharge in a timely manner" (1 Bankruptcy Law Manual § 2:5 [5th ed.]; *see e.g., Johnson v JP Morgan Chase Bank*, 395 BR 442 [ED Cal 2008]). Thus, where a debtor fails to schedule a known creditor or otherwise notify the creditor of his or her bankruptcy filing, he or she forfeits the right to have a dischargeability determination made solely by the bankruptcy court (*see* 11 USC § 523 [a] [3]; 1 Bankruptcy Law Manual § 2:5 [5th ed]). Therefore, the court may determine whether or not defendant's debt to plaintiff was, in fact, dischargeable (*see Gleeson v Phelan*, 2016 NY Slip Op 30993[U], *4 [Sup Ct, NY County 2016]; *Upper Manhattan Empowerment Zone Dev. Corp.*, 8 Misc 3d at 608).

Here, plaintiff, in his seventh cause of action, alleges a claim for breach of fiduciary duty. Plaintiff asserts that defendant owed him a fiduciary duty pursuant to the First Agreement, which was a partnership agreement. Plaintiff further asserts that defendant breached his fiduciary duty to him by commingling the funds belonging to the partnership with defendant's overall business, lying to him, and constantly misleading him when it came to paying him back.

A determination by the court that a debtor acted in a fiduciary capacity under 11 USC § 523 (a) (4) requires:

> "(1) a continuing relationship of trust existing prior to and irrespective of any particular act of wrongdoing, (2) a trust res or property with respect to which the party to be charged is accountable to others and (3) characteristically fiduciary duties over and above the obligations inherent in an ordinary, arm's length commercial relationship, whether such duties are created by contract, common law or statute" (*In re Zoldan*, 221 BR 79, 87 [SD NY 1998], *affd sub nom. Zohlman v Zoldan*, 226 BR 767 [SD NY 1998]).

In New York, such fiduciary duties, are imposed upon partners acting in their capacities as partners, pursuant to the common law, under the seminal decision of *Meinhard v Salmon* (249 NY 458 [1928]) and numerous other New York cases following it. Thus, partners have been held to be acting in a fiduciary capacity for purposes of 11 USC § 523 (a) (4) (*see id.*; *In re Stone*, 90 BR 71, 79-80 [SD NY1988], *affd* 94 BR 298 [SD NY1988], *affd* 880 F2d 1318 [2d Cir 1989]).

The First Agreement provided that there was a partnership between plaintiff and defendant, and that the two of them were "full partners" in the ownership of the goods of the container. Plaintiff alleges that defendant has breached his fiduciary duty to him as his partner.[3] Defendant was acting in a fiduciary capacity with respect to the funds invested by plaintiff in the partnership, which is the basis for the liability which is claimed to be nondischargeable (*see In re Zoldan*, 221 BR at 87).

The court next determines whether defendant's breach of fiduciary duty amounted to either fraud, defalcation, embezzlement, or larceny within the meaning of 11 USC § 523 (a) (4). For purposes of 11 USC § 523 (a) (4) of the Bankruptcy Code, defalcation requires an "intentional wrong," "conduct the fiduciary knows is improper" or "reckless" conduct (*Bullock v BankChampaign*, N.A., 569 US 267, 273-274 [2013]; *see also In re Watterson*, 524 BR 445, 452 [ED NY 2015]). Thus, the failure of a fiduciary to account for or turn over property in his or her care constitutes defalcation within the meaning of 11 USC § 523 (a) (4) if the debtor had either knowledge of, or was reckless with regard to, the wrongful conduct that constitutes a breach of fiduciary duty (*see In re Watterson*, 524 BR at 452).

Here, defendant knew that he was required, under the First Agreement, to keep plaintiff's funds in "a special account so as not to mix up the funds of [plaintiff] into his overall business," but admitted that he mixed up these funds into his business. Defendant testified, at his deposition, that the monies plaintiff gave him "got tied up in the business"

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[3]Notably, plaintiff and defendant, who had met in high school, had been friends for many years prior to their entry into the First Agreement (defendant's deposition tr at 10).

(defendant's deposition tr at 87). Defendant agreed that the First Agreement specifically provided that plaintiff would be paid back exclusively from the funds in this deal, and that the monies that plaintiff loaned defendant would not be mixed up with other business expenses (*id.* at 88). Defendant conceded that the monies loaned by plaintiff did get mixed up in the business (*id.* at 88-89). Defendant admitted that contrary to the First Agreement, there was no special or separate account with respect to plaintiff's funds (*id.* at 89).

Defendant also knew that he took plaintiff's funds, as a partner, and was required to pay plaintiff back his $68,000, along with the profits. Defendant testified that under the First Agreement, plaintiff was to receive the profits from the sale of the container (*id.* at 21). Defendant admitted that he owed plaintiff these monies, but failed to pay him (*id.* at 28). Defendant also reassured plaintiff that he would be paid and kept stalling plaintiff's demands for payments while simultaneously surreptitiously filing for bankruptcy without listing plaintiff as a creditor. Defendant, while acting as plaintiff's partner, misappropriated and diverted assets that rightfully belonged to plaintiff and to which plaintiff was entitled pursuant to the First Agreement. Consequently, the court finds that defendant committed defalcation while acting in a fiduciary capacity. Therefore, defendant's debt to plaintiff was nondischargeable pursuant to 11 USC § 523 (a) (4) and, thus, it was not discharged by defendant's March 10, 2016 discharge in bankruptcy (*see In re Zoldan*, 221 BR at 87; *In re Stone*, 90 BR at 80).

Defendant argues, however, that plaintiff's breach of fiduciary claim is merely duplicative of plaintiff's breach of contract claim, which, he asserts, was discharged in bankruptcy. This argument is rejected. "It is well established that 'the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself'" (*Centerline/Fleet Hous. Partnership, L.P.-Series B v Hopkins Ct. Apartments, LLC*, __ AD3d __, 2019 NY Slip Op 07171, *2 [4th Dept Oct. 4, 2019], quoting *Mandelblatt v Devon Stores*, 132 AD2d 162, 167-168 [1st Dept 1987]; *see also Meyers v Waverly Fabrics, Div. of Schumacher & Co.*, 65 NY2d 75, 80 n 2 [1985]; *37 E. 50th St. Corp. v Restaurant Group Mgt. Servs., L.L.C.*, 156 AD3d 569, 571 [1st Dept 2017]; *La Barte v Seneca Resources Corp.*, 285 AD2d 974, 976 [4th Dept 2001], *rearg denied* 731 NYS2d 136 [4th Dept 2001]). While plaintiff's fiduciary duty cause of action arises out of the same underlying transaction as his breach of contract cause of action, i.e., the First Agreement, the breach of fiduciary duty cause of action is based on distinct factual theories and allegations (*see Centerline/Fleet Hous. Partnership, L.P.-Series B*, 2019 NY Slip Op 07171, *2).

Defendant denies that he made any profits under the First Agreement, and contends that he is only required to pay plaintiff the amount above the $68,000 if he made a profit. Defendant testified, at his deposition, that he would usually sell the bags in the container for a 30% markup, and that he received less than this (defendant's deposition tr at 27-29). Defendant, however, admitted that he did, in fact, sell all of the bags in the container, and

that the actual reason that he did not pay plaintiff was because "the money got into the business," that "there were bills to pay and other stuff," and that the money "got tied up in the business" (defendant's deposition tr at 24, 28, 87). Defendant's statement, in his April 19, 2019 affidavit submitted in support of his instant motion, that "there was very little money received from the sale of these goods," and that there was "never any actual profit from the sale of the container's goods," is inconsistent with his prior deposition testimony, his previous assurances to plaintiff that he was going to pay him the full amount owed, and the checks he gave to plaintiff. Defendant's statement is his affidavit appears to be merely an attempt to raise a feigned issue of fact (*see generally Rabiea v Darwish*, 170 AD3d 760, 761 [2d Dept 2019]). Thus, plaintiff is entitled to recover the full 11% of $68,000.

While the court finds that defendant's debt to plaintiff was nondischargeable based upon plaintiff's breach of fiduciary claim, the court further notes that subsequent to the March 10, 2016 bankruptcy discharge order, defendant reaffirmed his debt to plaintiff. Pursuant to General Obligations Law § 5-701 (a) (5), "a subsequent or new promise to pay a debt discharged in bankruptcy" is not barred by the statute of frauds if "it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith." Thus, so long as the statute of frauds is satisfied, a promise by a debtor, even after a legal obligation to pay has been discharged through bankruptcy, is binding without there being some new consideration for the debtor's promise.

After the March 10, 2016 bankruptcy discharge, in a WhatsApp chat, dated May 2, 2016, which contains both plaintiff and defendant's printed names, defendant stated that he owed plaintiff the $68,000, $23,000, and $12,000 under the agreements, and asked plaintiff for the total amounts owed by him. Plaintiff, in the WhatsApp chat, then stated to defendant that he calculated the amount that defendant owed him as $68,000 plus $12,000 under the First Agreement, $23,000 plus $2,760 under the Second Agreement, and $12,000 plus $720 under the Third Agreement, for a total of $118,480.[4] Defendant, in the WhatsApp chat, in response, acknowledged that he owed plaintiff this $118,480 sum. Defendant also admitted, at his deposition, that he owed plaintiff $118,480 at that time (defendant's deposition tr at 101-102). Defendant, after the March 10, 2016 bankruptcy discharge, also gave plaintiff checks, dated October 1, 2016, in the amount of $118,480, written by his wife, which bounced, and defendant, in the WhatsApp chat with plaintiff, expressly stated that he was giving plaintiff these checks in payment of the amount owed by him. Defendant further paid plaintiff $44,000 of the amount owed by checks in June 2017, acknowledging his debt to plaintiff. Defendant, at his deposition, stated that he only paid $44,000 of the amount owed because he did not have sufficient funds to pay plaintiff the full amount that he owed him, and that was how much he had at the time to give him back (*id.* at 120).

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[4]It is unclear as to why plaintiff calculated that a $12,000 return was owed on the $68,000 under the First Agreement or why a $2,760 interest payment was owed on the $23,000 under the Second Agreement. Plaintiff, in his instant motion, however, states that he is seeking $7,480 as his 11% share of the profit under the First Agreement plus statutory interest.

Defendant argues that the WhatsApp chat cannot satisfy the statute of frauds because he did not subscribe his statements. It has been held that "'[a[n e-mail sent by a party, under which the sending party's name is typed, can constitute a [signed] writing for [the] purposes of the statute of frauds'" (*Agosta v Fast Sys. Corp.*, 136 AD3d 694, 695 [2d Dept 2016], quoting *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011]; *see also Trueforge Global Mach. Corp. v Viraj Group*, 84 AD3d 938, 939 [2d Dept 2011]; *Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [1st Dept 2008], *lv dismissed* 10 NY3d 930 [2008]). Although defendant did not type his name since this was a WhatsApp chat, as opposed to an email, the WhatsApp chat contained defendant's electronically printed name, and defendant does not deny that he made these statements. Moreover, defendant acted upon these statements by giving plaintiff the checks, as he stated that he was doing in the WhatsApp chat. While partial payments alone would not satisfy the statute of frauds, here, there were not only partial payments unequivocally referable to the First Agreement, but defendant reaffirmed his debt in the WhatsApp chat which contains his electronically printed name, and defendant, at his deposition, agreed that he owed plaintiff the monies for which the checks were made at that time (defendant's deposition tr at 102). Defendant's actions in giving plaintiff these checks would "be unintelligible or at least extraordinary, explainable" only with reference to defendant's agreement to repay plaintiff, as set forth in the WhatsApp chat (*Alayoff v Alayoff*, 112 AD3d 564, 566 [2d Dept 2013], *lv dismissed* 24 NY3d 945 [2014] [internal quotation marks omitted]).

"The defendant's admission of the existence and essential terms of the oral agreement '[was] sufficient to take the agreement outside the scope of the Statute of Frauds'" (*Concordia Gen. Contr. v Peltz*, 11 AD3d 502, 503 [2d Dept 2004], quoting *Dzek v Desco Vitroglaze of Schenectady*, 285 AD2d 926, 927 [3d Dept 2001]; *see also Matisoff v Dobi*, 90 NY2d 127, 134 [1997]; *Bono v Cucinella*, 298 AD2d 483, 484 [2d Dept 2002]). "Indeed, the statute of frauds was not enacted 'to enable [a] defendant[] to interpose [it] as a bar to a contract fairly, and admittedly, made'" (*Concordia Gen. Contr.*, 11 AD3d at 503, quoting *Morris Cohon & Co. v Russell*, 23 NY2d 569, 574 [1969]). Consequently, while the court finds that defendant is liable for the amounts owed to plaintiff under a theory of breach of fiduciary duty, under which the debt was not discharged in bankruptcy, defendant could also be held liable for breach of contract based upon defendant's reaffirming his debt to plaintiff following the March 10, 2016 bankruptcy discharge.

The amount owed by defendant to plaintiff must now be calculated. Under the First Agreement, defendant owes plaintiff the principal sum of $68,000, plus 11% interest in the amount of $7,480, which totals $75,480. Since defendant has already paid plaintiff $44,000, which is $6,900 above the $37,100 amount owed under the Second Agreement and the Third Agreement, $6,900 must be subtracted from $75,480, which equals $68,580.[5]

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[5]The total amount which were owed under the three agreements were: $68,000 plus $7,480 constituting 11% share of profits, $23,000 plus $1,380 constituting 6% interest, $12,000 plus $720 constituting 6% interest. This equals $112,580. When the sum of $44,000 is subtracted from $112,580, $68,580 remains owed to plaintiff.

Plaintiff also seeks an award of prejudgment interest. CPLR 5001 (a) provides:

> "Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

"It is well settled that the purpose of awarding interest is to make an aggrieved party whole" (*Cohen v Gordon*, 297 AD2d 272, 274 [2d Dept 2002]). Here, plaintiff was both deprived of his money and the opportunity to realize a fair rate of return on his money. Plaintiff is entitled to prejudgment interest pursuant to CPLR 5001 (a) upon the principal sum awarded (*see* CPLR 5001 [a]; *Huang v Sy*, 62 AD3d 660, 661 [2d Dept 2009]; *Cohen*, 297 AD2d at 274; *Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 [1st Dept 2000]).

Pursuant to CPLR 5001 (b), "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed." Plaintiff is entitled to prejudgment interest on the $68,580 owed to him by defendant at the rate of nine percent per annum from October 24, 2014, the date payment was due under the First Agreement until the date of this decision and order (*see* CPLR 5004). This equals $30,861 ($6,172.20 x five years). Thus, the $68,580 owed plus prejudgment interest of $30,861 equals a total of $99,441 due and owing from defendant to plaintiff.

Plaintiff also requests, in his motion, for an award of attorney's fees to him. "Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by

agreement between the parties or by statute or court rule" (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). Thus, plaintiff's request for attorney's fees is denied since the First Agreement does not provide for an award of attorney's fees.

Conclusion

Accordingly, plaintiff's motion for summary judgment in his favor, under motion sequence number four, is granted to the extent that plaintiff is awarded and defendant is directed to pay plaintiff the total sum of $99,441, consisting of $68,580 owed plus prejudgment interest of $30,861. Defendant's motion for summary judgment, under motion sequence number five, dismissing plaintiff's complaint against him is denied.

This constitutes the decision, order, and judgment of the court.

E N T E R;

J. S. C.
HON. WAYNE P. SAITTA
J.S.C.

NANCY T. SUNSHINE
Clerk

KINGS COUNTY CLERK
FILED
2019 OCT 25 AM 8:42

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2019 OCT 29 PM 12:42